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No. 79-1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT *EN BANC*

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INTEREST OF AMICUS*/

The American Civil Liberties Union is a nationwide, non-profit organization with more than 200,000 members. For more than sixty years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has long been an active participant in litigation involving the constitutionality and interpretation of the federal election laws.

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*/ Letters of consent to the filing of this amicus brief from the attorneys for all parties are being sent to the Clerk of the Court under separate cover.

The ACLU participated in two of the early cases involving the Federal Election Campaign Act of 1971, United States v. National Committee for Impeachment, 469 F. 2d 1135 (2d Cir. 1972), and ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1923) (three-judge court), vacated as moot sub nom.Staats v. ACLU, 422 U.S. 1030 (1975).

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in Buckley v. Valeo, 424 U.S. 1 (1976). Recently, the ACLU served as counsel for two of the defendants in Federal Election Commission v. Central Long Island Tax Reform Immediately Committee , 616 F. 2d 45 (2d Cir. 1980) (en banc), where the Second Circuit unanimously held that certain reporting and disclosure requirements of the Federal Election Campaign Act did not apply to political leaflets that did not expressly advocate

the election or defeat of a particular candidate. At present, the ACLU is providing counsel to one of the plaintiffs in Mott v. Federal Election Commission, 494 F. Supp. 131 (D.D.C. 1980), a case that involves, inter alia, the constitutionality of one of the provisions at issue here, 2 U.S.C. 441a(a)(1)(C).

SUMMARY OF ARGUMENT

2 U.S.C. 441a(a)(1)(C) substantially impinges upon independent electoral advocacy. It restricts the collective political expression that associations such as appellants wish to undertake. And it severely burdens the ability of small groups of individuals that may wish to engage in political advertising in support of particular candidates but independent of these candidates' campaigns. No compelling

governmental interest justifies the regulatory reach of Section 441a(a)(1)(C). Furthermore, the governmental concerns that the provision may have been intended to address are more specifically addressed by other sections of the Federal Election Campaign Act. The statutory provision is, therefore, overly broad and must be invalidated.

INTRODUCTION

In Buckley v. Valeo 424 U.S. 1 (1976), this Court reviewed the constitutionality of various provisions of the Federal Election Campaign Act. The federal statute, as amended in 1974, had imposed, inter alia, a $1,000 monetary limitation upon the amount that an individual could contribute to a candidate or a candidate's authorized campaign committees. It imposed a $5,000 limitation upon contributions by a political committee to a candidate. And it imposed a $25,000 limitation upon the total contributions by an individual during a calendar year.

The statute had also imposed a variety of monetary limitations on the amount that could be spent in connection with electoral contests. Individuals and groups were limited to expenditures of $1,000 "relative

to a clearly identified candidate," even where such expenditures were undertaken independent of the candidate or the candidate's authorized political committees. The personal expenditures of candidates and the families of candidates were also subjected to limitations. And ceilings on overall campaign expenditures were imposed. In Buckley, this Court upheld the restrictions pertaining to campaign contributions and invalidated the limitations imposed upon expenditures.

In response to this Court's decision in Buckley, Congress amended the Federal Election Campaign Act in 1976 to impose new limits on contributions to political committees. Prior to 1976, the contribution limitations imposed by the statute pertained only to donations given either

to the candidate or to the candidate's authorized political committees.*/ The pre-Buckley statute made no effort to restrict contributions to organizations or groups that wished to engage in independent electoral advocacy. However, after this Court's decision in Buckley, the 1976 amendments to the federal statue limited not only contributions made directly or

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*/ Prior to 1976 the contribution limitations were codified at 2 U.S.C. 608(b), which provided in pertinent part:

"(1). . . no person shall make contributions to any candidate with respect to any election for Federal Office which, in the aggregate, exceed $1,000.00

(2) No [multi-candidate] political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000.000 (Emphasis supplied.)"

indirectly to the candidates, but also limited contributions to organizations that engaged in independent expenditures. Specifically, 2 U.S.C. 441a(a)(1)(A) imposed a $1,000 limitation upon contributions "to any candidate and his authorized political committees." Contributions to the "political committees established and maintained by a national political party" were limited to $20,000, under 2 U.S.C. 441a(a)(1)(B). And, pursuant to 2 U.S.C. 441a(a)(1)(C), contributions "to any other political commitee" were limited to $5,000. Because of the broad statutory definition of "political commitee"*/

*/ The FECA defined "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A).

Section 441a(a)(1)(C) of the 1976 amendments thus established a "catch-all" category of political committee, described as "any other political commitee."

Under this catch-all category of "other political committees," Section 441a(1)(c) regulates the activity of groups or associations that essentially function outside the mainstream of particular electoral campaigns. These groups may engage in "independent spending" in support of a candidate.*/ Or these associations may collect funds with a view towards ultimately contributing the funds to particular candidates. But the committees whose

*/ Independent spending or independent expenditures as used here involves the purchase of political advertising in support of a candidate for federal office without any coordination or consultation with the candidate or the candidate's authorized political committees.

contribution solicitation activity is restricted by Section 441a(1)(C) are, in essence, organizations that are independent from any campaign.

This case raises the question whether it is constitutionally permissible for Section 441a(a)(1)(C) of the Federal Election Campaign Act (FECA) to reach beyond the confines of political campaigns and extend its restrictions to the activity of citizens and associations that undertake political associations in a manner that is independent of any political campaigns.

Amicus believes that 2 U.S.C. 441a(1)(C) is unconstitutional in its reach. Because the provision impinges upon core First Amendment activity, it can be sustained only if it advances compelling governmental interests by means least likely to intrude upon the First Amendment freedom to engage in vigorous advocacy

regarding candidates for public office. Amicus concludes that Section 441a(a)(1)(C) is only remotely related to any significant governmental interests and that it is not necessary to meet the governmental concerns against which it was designed to guard, concerns which are already specifically addressed by other sections of the Federal Election Campaign Act.

We believe, therefore, that Section 441a(a)(1)(C) is unconstitutional as applied to the independent electoral advocacy that the instant appellants may wish to undertake. The burden of this amicus brief, however, is to call to the Court's attention a specie of independent electoral advocacy that differs, in some respects, from the variety of political association represented by the appellants here. Section 441a(a)(1)(C) not only restricts the activities of associations

such as the California Medical Political Action Committee (CALPAC), but also the activities of small, ad hoc groups that engage solely in independent expenditures over which the contributors retain substantial personal control. The principal focus of this brief will be upon the constitutionality of §441a(a)(1)(C)'s restrictions on this ad hoc variety of independant electoral advocacy.

ARGUMENT

I. LIMITATIONS ON CONTRIBUTIONS TO SMALL POLITICAL COMMITTEES THAT ENGAGE SOLELY IN INDEPENDENT EXPENDITURES OVER WHICH CONTRIBUTORS RETAIN SUBSTANTIAL CONTROL VIOLATE THE FIRST AMENDMENT.

A. The Reach of 2 U.S.C. 441a (a)(1)(C).

Under the Federal Election Campaign Act (FECA) a political committee is defined as "any committee, club, association, or other group of persons which receives contributions...or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." 2 U.S.C. 431(4)(A).

It follows, therefore, that if two or three persons were to form a group; and if, sharing the same political views these individuals were to draft a political advertisement or advertisements supporting a candidate for federal office; and if, still further, the individuals were to place the

political advertisements that they had drafted in a local newspaper at an expense exceeding $1,000; such a group of individuals would be regarded as a "political committee" under the Federal Election Campaign Act, and subjected to restrictions described in detail infra. Moreover, in the above-described circumstance, these individuals would be thought to have formed a "political committee" even if they were to undertake these electoral expenditure activities in a manner that was entirely independent from and not coordinated with the candidate that they had chosen to support. */

*/ The above-described factual situation is not hypothetical. It describes essentially what Stewart Mott was seeking to do, as set forth in the allegations in his complaint in Mott v. Federal Election Commission, supra. Moreover, the Federal Election Commission's files apparently include several examples of two-person independent spending committees. For instance, two women formed the "Ad Hoc

(fn. cont. on next page)

Having defined the above-described independent, grassroots enterprise as the action of a "political committee," the limitations imposed by the Federal Election Campaign Act upon contributions to "political committees" would be applied. Thus, 2 U.S.C. 441a(a)(1) limits contributions to three categories of political committees: "authorized political committees," (See 2 U.S.C. 441a(a)(1)(A)); "political committees established and maintained by a national political party," (See 2 U.S.C. 441a(a)(1)(B)); and "any

(fn. cont. from preceding page)
Committee Concerned for Life" in order to place an advertisement in the Long Island Catholic, supporting then-Senator James Buckley. Several other examples of two-person independent committees are described in Note, "The Unconstitutionality of Limitations On Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments" 86 Yale L.J. 953, 959, n. 39 (1977).

other political committee," (See 2 U.S.C. 441a(a)(1)(C)). Since the enterprise described above could not be defined as the work of either an "authorized political committee" or a "political committee established...by a national political party," the group would be subject to the limitations imposed by Section 441a(a)(1)(C). That provision effectively prohibits any individual from contributing more than $5,000 to the independent political advertising venture described above.

This conclusion with respect to the application of 2 U.S.C. 441a(a)(1)(C) to the situation described above is reinforced by two Federal Election Commission (FEC) publications. A document entitled Campaign Guide for Congressional Candidates and their Committees (FEC, February 1978), states at p. 8:

> "There is no limit on the amount or frequency of independent expenditures, but they must be reported. However, a group of individuals collectively making 'independent expenditures' which exceed $1,000 in a calendar year would be considered a political committee with registration and periodic reporting obligations. And any contribution to a political committee making independent expenditures on behalf of only one candidate is subject to the per candidate, per election limitations." */ (Emphasis in original).

B. Insofar as Section 441a(a)(1)(C) Applies to the Above-Described Two-Person Spending Committee the Provision Effectively and Substantially Restricts Independent Electoral Advocacy.

As indicated above, Section 441a(a)(1)(C) effectively prohibits any individual from contributing more than $5,000 to an

*/ A September 1978 publication of the Federal Election Commission entitled Bookkeeping and Reporting Requirements Manual for Candidates and Committees at p. 34, recites the same proposition.

unauthorized political committee, such as the sort of small committee that might be formed to undertake independent expenditures. (See description supra, Point IA). This provision therefore substantially and effectively restricts independent electoral advocacy.

First, if the independent political advertising that the above-described two-person spending committee wished to undertake were to cost more than $10,000--as many political advertising campaigns do--such an enterprise would be entirely foreclosed by operation of 2 U.S.C. 441a (a)(1)(C). In this circumstance a full page advertisement in the Sunday New York Times might be foreclosed.

In other instances a wealthy member of a small group might want to undertake independent political spending in

conjunction with less wealthy colleagues who share the same political views. Although the wealthy contributor could spend more than $5,000 if he acted alone, §441a(a)(1)(C) forces him to forfeit his right to associate with others unless he limits himself to a $5,000 contribution. It also would force other less wealthy members of the group to contribute more in order to finance the advertising campaign.

It is thus the case that in the situations described above, Section 441a (a)(1)(C) of the Federal Election Campaign Act severely burdens and, in some instances, absolutely forecloses grass-roots independent expenditure activity by small groups of persons, and severely burdens the right to associate for political purposes.

C. Grass Roots Independent Expenditures of the Sort Described Above Are Entitled to Plenary Protection under the First Amendment. Limitations Upon Such Independent Electoral Advocacy Must be Subjected to Heightened Judicial Scrutiny.

In Buckley v. Valeo, supra, this Court underscored the vitality and importance of independent electoral advocacy. The Court declared, supra at 48:

> "[T]he First Amendment right to 'speak one's mind...on all public institutions' includes the right to engage in 'vigorous advocacy no less than abstract discussion.' [citations omitted] Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage of defeat of legislation."

At the same time, this Court recognized that such electoral advocacy need not be carried out as an individual enterprise.

The Court acknowledged the virtues of collective expression and its capacity to enhance and amplify the solitary voice in the political marketplace. Thus, this Court in Buckley noted that, at the heart of the Court's "recognition of First Amendment protection of freedom of association" was an understanding of the capacity of associative expression to "amplify the voice" of the individual group members. Buckley v. Valeo, supra at 22. The Court cited Sweezy v. New Hampshire 354 U.S. 234 (1957) and NAACP v. Button 371 U.S. 415 (1963) in concluding that the statutory

> "constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'..." Buckley v. Valeo, supra at 22.

While recognizing the virtue of collective expression and its capacity to enhance

the political statements advanced by an individual, the Buckley Court, nevertheless, identified what it seemed to regard as a qualitative difference between expenditures and contributions as they pertained to group expression. The Court noted that the contributor cedes to the candidate or to the candidate's authorized political committee control over what is said. Accordingly, the Court concluded that a contribution, while it may serve as a general expression of the contributor's support for the candidate, only involves speech "by someone other than the contributor." Buckley v. Valeo, supra at 21. And the Court reasoned that restrictions upon contributions were, therefore, only limitations upon symbolic or vicarious speech.

On the other hand, the person who

engages in independent expenditures, retains control over what is said and, therefore, has a more profound interest in the particular expressive activity. Accordingly, the Court concluded, limitations upon expenditures constitute a more direct and substantial impingement upon free expression.

The majority opinion in the Court below relied, in part, upon this distinction between contributions and expenditures. And labeling Section 441a(a)(1)(C) as a "contribution limitation" the lower court upheld its constitutionality. (A-14).*/

But such blind reliance upon labels is misleading. For upon closer analysis it is evident that the line between limitations

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*/ Parenthetical references preceded by the prefix "A" are to the Joint Appendix filed by the parties with the Court.

upon contributions and restrictions on expenditures cannot be so clearly drawn. Thus, for example, where two persons join in the purchase of political advertising that they have jointly drafted, the monetary contributions by each of these persons involves no vicarious speech. Each of the contributors to such a "political committee" personally engages in electoral advocacy. Contribution limitations imposed by 2 U.S.C. 441a(a)(1)(C) impinge directly upon such advocacy.

It thus appears that any substantial restriction upon independent electoral advocacy, whether in the guise of a "contribution limitation"or a restriction upon expenditures can be sustained only if it survives heightened judicial scrutiny. Because 2 U.S.C. 441a(a)(1)(C) poses such

a substantial restriction it must be subjected to rigorous judicial review.

Finally, even if, in some circumstance, there is a sharp difference between the expressive quality of an expenditure and a contribution, amicus contends that contribution limitations as well as expenditure restrictions must be subjected to heightened judicial scrutiny. Amicus reaches this conclusion by examining this Court's opinion in Buckley, where rigorous scrutiny was applied to both the contribution and expenditure restrictions.

The Court prefaced its analysis in Buckley, with the observation that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the

operation of the system of government established by our Constitution." Buckley v. Valeo, supra at 14.

Moreover, an examination of the specific methodology of analysis employed in Buckley reinforces the conclusion that the Court subjected the contribution limitations to heightened scrutiny. The Court began by identifying the fundamental rights that were implicated by the Congressional restriction imposed upon campaign contributions. The Court noted that political contributions represent an important aspect of one's associational freedoms. Id at 22. And it announced that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Id. The Court went on to analyze the governmental interests that were advanced by the contribution

limitations. And after engaging in this analysis it concluded: "We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceilings." Id. at 29.

In sum--whether viewed as a contribution limitation or a restriction on expenditures--Section 441a(a)(1)(C) imposes substantial restraints upon independent electoral advocacy, and must be subjected to heightened scrutiny. The statutory provision must be shown to advance compelling governmental interests by means least likely to restrict free expression. Buckley v. Valeo, supra; Dunn v. Blumstein,

405 U.S. 330, 342 (1972); Shelton v. Tucker, 364 U.S. 479 (1960).

D. Section 2 U.S.C. 441a(a)(1)(C) Fails to Advance any Compelling Governmental Interests by Means Least Likely to Intrude Upon First Amendment Freedoms.

Where heightened judicial scrutiny is applied, the statutory enactment under review must be necessary to the advancement of compelling governmental interests. Dunn v. Blumstein, supra. The purposes of Section 441a(a)(1)(C) are discussed in the Conference Committee Report on the 1976 Amendments to the Federal Election Campaign Act. The Report states:

> "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees,... is predicated on the following considerations: first, these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions

> to a candidate; second, these limits serve to assure that candidate's reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign."
>
> H.R. Rep. 1057, 94th Cong. 2d Sess. 56-57 (1976); U.S. Code Cong. & Administr. News, 973 (1976).

The first and third of these rationales are essentially the same: The desire to prevent evasion of the candidate contribution limitations. The second putative concern--a desire to insure the reporting of root sources--appears to have no logical connection to the contribution limitations imposed by 2 U.S.C. 441a (a)(1)(C).

With regard to the desire to prevent

evasion of the contribution limitations it is plain that this governmental interest is protected by several other provisions under the FECA's statutory scheme. Thus, 2 U.S.C. 441a(a)(7)(B)(i), provides, in effect, that expenditures that are not truly independent and that are in fact coordinated with a candidate or the candidate's authorized political committee will be treated as a contribution to the candidate.

Similarly, 2 U.S.C. 441a(a)(8) provides that any transfer of funds "in any way earmarked or otherwise directed through an intermediary or conduit" to a particular candidate will be considered a contribution to the candidate.

And the 1976 Amendments contain so-called "non proliferation" provisions which are designed to prevent persons or

organizations from evading the candidate contribution ceilings by the technique of creating multiple "dummy" committees. Thus, 2 U.S.C. 44la(a)(5) essentially provides that all political committees "established or financed or maintained or controlled" by the same corporation, labor organizations or other persons are to be considered a single political committee entitled to contribute only $1,000 or $5,000 to a federal candidate.

With all of these other provisions guarding against the potential evasion of the candidate contribution ceilings it cannot be said that Section 44la (a)(1)(C) is <u>necessary</u> to the advancement of this governmental interest.

In upholding the statutory provision, the majority opinion below attempted to justify its decision by concluding that

the "contribution limitations" imposed by 441a(a)(1)(C) advanced the governmental concern with the corrupting influences posed by political committees. The court below found that the restrictions "prevent the fact or appearance of excessive ties between a committee or its donors, on the one hand, and direct contributions to candidates on the other." (A-17, A-18) But Judge Choy was correct, in the court below, in pointing out that this "anti-corruption" concern cannot be said to justify the instant statutory provision. First, where heightened judicial scrutiny is applied, the actual concerns of the legislature must be examined. Hypothesized, post hoc justifications cannot be proferred in support of the challenged legislation. See Cleveland Board of Education v. La Fleur, 414 U.S. 632, 653 (1974); Vlandis

v. Kline, 412 U.S. 441, 449 (1973). In the case at bar, "anti-corruption" was never articulated by Congress as a basis for the instant statutory provision.

Second, it is likely that the concern regarding corruption was never proferred by Congress as a rationale for Section 441a (a)(1)(C) because the statutory provision addresses the anti-corruption concern only in the most attenuated fashion. Section 441a(a)(1)(C) regulates the relationship between an unauthorized political committee and its contributor. It has nothing whatever to do with the relationship between a contributor and a candidate, or between a contributor and an authorized political committee. The quid pro quo relationships that were the concern of the contribution limitations upheld in Buckley do not spring from the activity that

Section 441a(a)(1)(C) purports to regulate. This section has so little to do with the potential quid pro quo relationships between contributors and candidates that it cannot be found necessary to the advancement of the government's anti-corruption.

Finally the superfluous and anomalous nature of Section 441a(a)(1)(C) is highlighted by the following observation: The provision restricts contributions to political committees that will engage in either of two activities. The committees will undertake independent expenditures. Or the committees will, in turn, contribute their funds directly to candidates or authorized political committees. In the second situation, where the unauthorized committee is, in turn, contributing its funds to the candidate or to an

authorized committee, the provisions of Section 441a(a)(1) and (2) apply and impose limitations on candidate contributions at the point at which the candidate contributions are actually made. In this circumstance Section 441a(a)(1)(C) is, again, unnecessary.

In the first situation, where the committee engages in independent expenditures, the application of Section 441a (a)(1)(C) yields an anomalous result. For in Buckley v. Valeo, supra, this Court held that a committee wishing to engage in independent expenditures could not be subjected to restriction. Yet, Section 441a(a)(1)(C) limits the amount of money that can be solicited by such a committee that wishes to engage in such independent expenditures. As one commentator has

concluded: "If a person's independent speech cannot be restricted constitutionally, neither can his speech through association." Note, "The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments," 86 Yale L.J. 953, 967 (1977).

II. BECAUSE SECTION 441a(a)(1)(C) IS UNCONSTITUTIONALLY OVER-BROAD, THE DECISION BELOW MUST BE REVERSED.

In First Amendment cases involving basic rights of political expression, a statute overly broad in its restrictions must be declared unconstitutional if Congress could achieve its concerns by more narrowly tailored regulations. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963); See also Gooding v. Wilson, 405 U.S. 518 (1972); Village of Schaumberg v. Citizens For A Better Environment, __U.S.__, 63 L. Ed. 2d 73 (1980).

As suggested above, Amicus believes that Section 441a(a)(1)(C) unconstitutionally restricts the associational freedoms of the instant appellants.

However, even assuming arguendo, that the First Amendment is not offended by the application of Section 441a(a)(1)(C) to an association such as the California Medical Political Action Committee, the provision remains unconstitutional when applied to the independent expenditures of individuals of small, ad hoc groups, as described above in Point IA. Because, Section 441a(a)(1)(C) overreaches in its regulatory scope it must be invalidated under the First Amendment overbreadth doctrine. Gooding v. Wilson, supra; Village of Schaumberg v. Citizens For A Better Environment, supra; Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844 (1970).

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals for the Ninth Circuit should be reversed and 2 U.S.C. 441a(a)(1)(c) should be held unconstitutional.

Respectfully submitted,

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